

Improving Human Rights in the Private Security Industry: Envisioning the Role of ICoCA in Latin America[†]

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Abstract

The private security industry in Latin America has been associated with human rights abuses, particularly in the context of extractive operations. Most private security guards in the region are poorly trained and do not undergo adequate vetting. These factors combined with serious deficiencies in the rule of law across the region too often enable private security companies to effectively operate outside state control and engage in human rights abusive practices. This article argues that adoption of the International Code of Conduct for Private Security Providers (ICoC) by Latin American private security companies and states, coupled with civil society engagement with ICoC's Association, may help reduce negative human rights impacts arising out of private security services within the extractive industry.

Keywords: certification, extractive industry, ICoCA, Latin America, private security, procurement

I. INTRODUCTION

Private security is a thriving industry that has grown dramatically in Latin America over the last decade, due to high crime rates and perceptions of insecurity among the emerging middle class, as well as ineffective law enforcement.¹ As a result, Latin America has a notably high ratio of private security guards to police officers, some countries with many times more than the global average.² Private security personnel in Latin America are also the most heavily armed in the world outside of conflict zones.³ However, most private security guards in the region are poorly trained in the safe handling of firearms, conflict

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¹ Adam Blackwell, 'The Unregulated and Threatening Growth of Private Security in Latin America and the Caribbean', *Wilson Center* (June, 2015), <https://www.wilsoncenter.org/sites/default/files/Private%20Security%20in%20Latin%20America.pdf> (accessed 30 April 2018).

² Sarah Kinoshian and James Bosworth, 'Security for Sale: Challenges and Good Practices in Regulating Private Military and Security Companies in Latin America' (2018) *Inter-American Dialogue*. Available at: <https://globalinitiative.net/security-for-sale-challenges-and-good-practices-in-regulating-private-military-and-security-companies-in-latin-america/> (accessed 13 December 2018).

³ Geneva Centre for the Democratic Control of Armed Forces, 'The Montreux Document: A Mapping Study on Outreach and Implementation', 5 (2017), <http://www.mdforum.ch/pdf/mapping-study.pdf> (hereinafter DCAF Mapping Study).

resolution, and human rights.⁴ Guards, including those who may have served as military or police officers, are often not vetted to ensure they do not have a record of human rights violations.⁵ These factors, combined with serious deficiencies in the rule of law across the region, too often enable private security companies, also known as private security service providers (hereinafter collectively referred to as PSCs), to effectively operate outside state control.

In Latin America, PSCs hired to guard extractive projects have been involved in multiple high-profile cases of human rights abuse. In this article, the extractive industry refers not only to oil, gas and mining activities, but also to large-scale agribusinesses that produce monocultures such as palm oil or bananas.⁶ Extractive projects have proliferated in tandem with the private security industry in Latin America over the past two decades.⁷ Governments in the region implement or permit these projects to meet increasing demands for energy sources as well as provide revenue from exports. However, extractivism also often leads to intense social and land conflicts,⁸ which can in turn be exacerbated by the presence of PSCs. Due to clashes between extractive companies and local communities, PSCs in Latin America often operate in what the International Code of Conduct for Private Security Providers (ICoC) defines as complex environments:⁹ ‘areas experiencing or recovering from unrest or instability ... where the rule of law has been substantially undermined, and in which the capacity of the state authority’ is limited. While Latin American countries have made progress in advancing their legislative and regulatory frameworks for PSC operations in recent years,¹⁰ many laws still have gaps with regard to the selection, vetting, training and monitoring of PSCs personnel.¹¹ Moreover, even laws that are acceptable on paper are usually ineffective due to lack of implementation.¹² Public institutions in charge of overseeing PSCs tend to be under-funded and under-staffed, and efforts to increase their regulatory power are

⁴ See Anna-Catherine Brigida, ‘Guatemala Security: Those Who Can Afford it Buy Protection’, *BBC News* (21 July 2016), <http://www.bbc.com/news/business-36834477> (accessed 30 April 2018).

⁵ Kinoshian and Bosworth, note 2, 7.

⁶ Felipe Gomez Isa and Mikel Berraondo, *Los Derechos Indígenas tras la Declaración: El Desafío de la Implementación*, (Bilbao: Publicaciones de la Universidad de Deusto, 2013), 208.

⁷ The extractive industry globally is a growth factor of the PSC industry. DCAF Mapping Study, note 3, 8.

⁸ In the Americas, megaprojects tend to have a particular impact on the rights of rural indigenous communities (including access to traditional and sacred lands, environmental pollution, and availability of food resources), but such communities are often not adequately consulted by the state before project licenses are granted. Due Process of Law Foundation (DPLF) and Oxfam, ‘Right to Free, Prior and Informed Consultation and Consent in Latin America’ (9 September 2015), <http://www.dplf.org/en/resources/right-free-prior-and-informed-consultation-and-consent-latin-america> (accessed 30 August 2018).

⁹ The full definition provided by ICoC is as follows: ‘Complex environments’ – ‘any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent’. ICoC, ‘Definitions’, https://icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf (accessed 30 August 2018).

¹⁰ Kinoshian and Bosworth, note 2, 5.

¹¹ Human Rights Council ‘Report of The Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination’, A/HRC/36/47 (20 July 2017), paras 49, 52, 54, 56.

¹² Kinoshian and Bosworth, note 2, 5.

sometimes stymied by the PSC lobby.¹³ This is reflective of more general rule of law problems in the region.¹⁴

Against this backdrop, this article explores the ICoC (or ‘the Code’) and whether membership by Latin American stakeholders in the International Code of Conduct Association (ICoCA or ‘the Association’) has the potential to help reduce negative human rights impacts arising out of extractive projects in the region. The ICoC is an international soft law initiative¹⁵ that lays out standards for PSCs based on international human rights and humanitarian law. As the principal governance and oversight mechanism for the Code, the ICoCA monitors and promotes compliance with these standards via certification, monitoring and complaints mechanisms.¹⁶ ICoCA’s tripartite membership consists of states, PSCs and civil society organizations (CSOs). However, to date the initiative has had limited uptake in Latin America, despite the record of abuses by PSCs in the region indicating that greater adherence to human rights norms is sorely needed. This article argues that the ICoCA may be useful for improving PSC compliance with human rights standards when providing services to extractive companies in Latin America, and that accordingly states and CSOs should incentivize or require PSCs to join.

While other standards and multi-stakeholder initiatives (MSIs),¹⁷ such as the Montreux Document and the Voluntary Principles on Security and Human Rights, are also relevant to this analysis, we focus primarily on the ICoCA because it is a newer mechanism that offers a complementary framework bearing serious implementation by PSCs and states, and engagement by CSOs. Although human rights awareness has increased within the private security industry in recent years, the literature says little with specific regard to the ICoC’s application in Latin America and it remains relatively unknown to stakeholders in the region.¹⁸ Therefore, this article also aims to contribute to raise awareness of the ICoC and the ICoCA as viable mechanisms applicable to Latin America.

The following section discusses case studies in which PSCs employed by extractive companies in several Latin American countries were involved in human rights abuses. The main purpose of this section is to highlight the need for PSCs to implement stronger

¹³ Kinoshian and Bosworth, note 2, 10.

¹⁴ Jorge L Esquirol, ‘The Failed Law of Latin America’ (2008) 56 *American Journal of Comparative Law* 75.

¹⁵ Rebecca DeWinter-Schmitt, ‘International Soft Law Initiatives: The Opportunities and Limitations of the Montreux Document, ICoC, and Security Operations Management System Standards’, in H Torroja (ed), *Public International Law and Human Rights Violations by Private Military and Security Companies* (2017).

¹⁶ Anne-Marie Buzatu, ‘Towards an International Code of Conduct for Private Security Provides: A View from Inside a Multistakeholder Process’, DCAF (2015), <https://icoca.ch/sites/default/files/resources/DCAF-SSR-12.pdf> (accessed 30 April 2018). Amol Mehra, ‘Submission to the Corporate Human Rights Benchmark by the International Corporate Accountability Roundtable (ICAR)’, *International Corporate Accountability Roundtable* (24 September 2015), https://business-humanrights.org/sites/default/files/documents/ICAR%20Submission%20to%20Consultation%20on%20Corporate%20Human%20Rights%20Benchmark%20%281%29_0.pdf (accessed 30 April 2018).

¹⁷ ‘Multi-stakeholder initiatives (MSIs) are collaborations between businesses, civil society and other stakeholders that seek to address issues of mutual concern, including human rights and sustainability. To do so, initiatives may work to facilitate dialogue across stakeholder groups, foster cross-sector engagement, or develop and apply standards for corporate or government conduct.’ MSI Integrity, ‘What are MSIs?’, <http://www.msi-integrity.org/what-are-msis> (accessed 30 April 2018).

¹⁸ Important contributions to the study of PSCs in Latin America include Kinoshian and Bosworth, note 2, and Alan Bryden et al, ‘Armed Private Security in Latin America and the Caribbean. Oversight and Accountability in an Evolving Context’, UNLIREC and DCAF (2016) 51, http://www.unlirec.org/documents/reg_study_prisec_Dec16.pdf (accessed 30 April 2018).

human rights policies, such as those established in the ICoC. The third section discusses the international initiatives that complement the ICoC, explains the relevance of the ICoCA for Latin America, and identifies what responsibilities PSCs, states and CSOs undertake upon joining the ICoCA. The main argument in this section is that the ICoC provides a useful framework for PSCs to advance respect for human rights and provide remedy for abusive business practices in Latin America. Based on this background, the fourth section offers recommendations to promote the implementation of the ICoC and increase engagement in the ICoCA. The central recommendation is that Latin American states should enact laws and implement policies consistent with the ICoC to foster a speedy internalization of human rights standards within the corporate culture of PSCs.

II. CASE STUDIES: THE HUMAN RIGHTS PROBLEM OF PSCs AND EXTRACTIVE INDUSTRIES IN LATIN AMERICA

Extractive industries, including monoculture farms and other agribusinesses, are some of the most prominent clients of PSCs in Latin America.¹⁹ In addition to ineffective law enforcement and unstable political contexts,²⁰ the unregulated development of extractive industries is a contributing factor to the overall growth of the private security industry in the region.²¹ As Kinosian and Bosworth point out in their regional study, the human rights problems of PSCs in Latin America are particularly salient in the extractive context.²² In nearly every country in the region, local populations affected by and protesting against extractive projects have been victims of excessive force and even killings by PSCs personnel.²³ These crimes are usually committed with impunity.²⁴ The following case studies exemplify the human rights violations that have resulted from the interaction of PSCs, extractive operations and local communities. These cases also refer to the national legal framework applicable to PSCs.

A. Honduras: Monocultures and Land Disputes

The Bajo Aguan region in northern Honduras has been the setting for violent land disputes in which PSCs hired by agribusinesses have been associated with severe human rights abuses against local communities,²⁵ including murder and attacks against protesters.²⁶ The land conflict stems from the Agriculture Sector Modernization and

¹⁹ Kinosian and Bosworth, note 2, 10.

²⁰ Elisabeth Karska, 'Human Rights Violations Committed by Private Military and Security Companies: An International Law Analysis' (2016) 17 *Espaço Jurídico Journal of Law* 753.

²¹ Bryden, note 18, 51. Blackwell, note 1.

²² Kinosian and Bosworth, note 2, 10.

²³ *Ibid*; Inter-American Commission on Human Rights, 'Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities' (2015) 62 (hereinafter IACHR Extractives Report).

²⁴ Kinosian and Bosworth, note 2, 10.

²⁵ Human Rights Watch, 'On the Margins of Profit' (18 February 2008), <https://www.hrw.org/report/2008/02/18/margins-profit/rights-risk-global-economy> (accessed 30 April 2018).

²⁶ Sarah Chayes, 'When Corruption is the Operating System. The Case of Honduras', *Carnegie Endowment for International Peace* (2017), 83 http://carnegieendowment.org/files/Chayes_Corruption_Final_updated.pdf (accessed 19 September 2018).

Development Act enacted in 1992²⁷ to allow the sale of large tracts of land that local residents owned collectively to agroindustrial firms,²⁸ and was exacerbated in the aftermath of the 2009 coup.²⁹ These factors enabled corporations to purchase thousands of acres of land for large-scale palm oil cultivation.³⁰ According to the information available, the land sales were conducted under duress and without the consent of affected community members.³¹

As land disputes intensified in Bajo Aguan, agribusinesses in other areas of the country hired PSCs to guard their properties from similar conflicts. This bolstered the private security industry in Honduras as a whole, resulting in 700 PSCs registered with approximately 70,000 guards, vastly outnumbering police officers in the country.³² At the same time, the growth of private security services exacerbated land conflicts in Bajo Aguan³³ and resulted in further human rights violations including forced disappearance.³⁴

A prominent case involved Dinant, a food and beverage company with extensive operations in Central America, including a large palm oil monoculture farm in Bajo Aguan.³⁵ Allegedly, Dinant hired the PSC that harassed, killed and forcibly displaced local peasants to discourage them from claiming their rights upon land that Dinant sought to control to expand its farmland.³⁶ However, the government did not increase resources for prosecution and investigation of these types of crimes.³⁷

²⁷ International Land Coalition (COCOCH), 'Reforma Agraria, Agricultura y Medio Rural en Honduras', http://bvirtual.infoagro.hn/xmlui/bitstream/handle/123456789/174/08_COCOCH_Reforma_Agraria_en_Honduras.pdf?sequence=1 (accessed 30 April 2018).

²⁸ Modernization of Agriculture Act 1994 (Honduras), http://www.ina.hn/userfiles/file/nuevos/ley_para_la_modernizacion_y_desarrollo_del_sector_agricola_lmDSA.pdf (accessed 30 April 2018).

²⁹ Kinoshian and Bosworth, note 2, 11.

³⁰ Human Rights Watch, note 25.

³¹ IACHR, Precautionary Measure No. 50-14, Resolution No. 11/2014 (8 May 2014) <https://www.oas.org/es/cidh/decisiones/pdf/2014/MC50-14-ES.pdf> (accessed 30 April 2018).

³² Ibid. Denisse Rodríguez, 'Regularán a más de 70,000 Guardias de Seguridad Privada', *La Prensa* (21 April 2017), <http://www.laprensa.hn/honduras/1064336-410/regularan-a-mas-de-70000-guardias-de-seguridad-privada> (accessed 30 April 2018).

³³ In Bajo Aguán, 92 people, most of whom were active in peasant organizations, were killed in the land disputes from 2009 to 2012. Human Rights Watch, note 11. In 2013, the UN Working Group on the Use of Mercenaries 'expressed concern about the involvement in human rights violations of private security companies hired by landowners'. 'Lista la Ley Especial que Regula Empresas de Seguridad Privada', *Abriendo Brecha* (12 July 2017), <http://www.abriendobrecha.tv/lista-ley-especial-regula-empresas-seguridad-privada> (accessed 30 April 2018). 'Con Nueva Ley Apretarán "Tuercas" a Empresas de Seguridad y Policías Municipales', *La Tribuna* (12 July 2017), <http://www.latribuna.hn/2017/07/12/nueva-ley-apretaran-tuercas-empresas-seguridad-policias-municipales> (accessed 30 April 2018). In 2014 the Inter-American Commission on Human Rights granted precautionary measures to leaders of peasant organizations, due to the grave human right abuses committed in the Bajo Aguan region. IACHR, 'Peasant Leaders of Bajo Aguan, Honduras', Precautionary Measures 50/14.

³⁴ Human Rights Watch, note 25.

³⁵ Dinant has faced audits and investigations from the accountability mechanism of the International Finance Corporation (IFC) of the World Bank Group. Human Rights Watch, note 25. Additionally, there is an ongoing lawsuit in a Federal US Court against the IFC for aiding and abetting gross human rights violations in Bajo Aguan, due to the IFC substantial financial investment provided to Dinant. EarthRights, 'Honduran Farmers Sue World Bank Group for Human Rights Violations', <https://www.earthrights.org/media/honduran-farmers-sue-world-bank-group-human-rights-violations> (accessed 30 April 2018). Chayes, note 26, 69 and 73–74.

³⁶ Claire Provost, 'Farmers Sue World Bank Lending Arm Over Alleged Violence in Honduras', *The Guardian* (8 March 2017), <https://www.theguardian.com/global-development/2017/mar/08/farmers-sue-world-bank-lending-arm-ife-over-alleged-violence-in-honduras> (accessed 30 April 2018).

³⁷ 'Reclamo de Tierras Convierte un Fértil Valle de Honduras en Campo de Guerra', *SDP Noticias* (23 August 2011), <https://www.sdpnoticias.com/notas/2011/08/23/reclamo-de-tierras-convierte-un-fertil-valle-de-honduras-en-campo-de-guerra> (accessed 30 April 2018).

Honduras has extremely high rates (95–98 per cent) of ongoing impunity for crimes.³⁸ Crimes related to land disputes have even higher levels of impunity.³⁹ Consequently, public distrust in the legal system and institutions is particularly acute.⁴⁰

In this context, in 2009, the government of Honduras issued the Private Security Services Control Rules, which established that PSCs must abide by the Constitution, defined key terms, created the Security Service Providers Control Unit in charge of the PSCs registrar and permits, and established obligations and responsibilities for PSCs.⁴¹ Nevertheless, the PSC registrar was ineffective and gun controls were not enforced.⁴² Therefore, in May 2017, Congress enacted a new law that created the Private Security Services Control Department in charge of regulating PSCs, which still needs to be regulated and implemented.⁴³ Despite the aforementioned regulations, private security guards in Bajo Aguan continue to be accused of murder and violence to date.⁴⁴

B. Peru: Use of Police as PSCs

Reports of human rights abuses by the private security guards of Minera Yanacocha (the Peruvian subsidiary of Newmont Mining, the world's second largest gold producer) have been ongoing since 2011.⁴⁵ The mine's operation in northern Peru's mineral-rich Cajamarca region has led to social conflict stemming from local residents' environmental concerns and disputes over the ownership of Tragadero Grande, a parcel of land located within the footprint of a multi-billion dollar gold and copper project called Conga.⁴⁶ Securitas is a large PSC with headquarters in Sweden; it has 8,000 employees in Peru

³⁸ IACHR, 'Violence, Inequality, and Impunity in Honduras' (2016), <http://www.oas.org/en/iachr/multimedia/2016/honduras/honduras-en.html> (accessed 30 April 2018).

³⁹ Human Rights Watch, note 25. In 2014 the Government created the Bajo Aguan Violent Deaths Special Unit for Investigation, in charge of investigating the crimes committed in associated with land disputes and any other violent death in Bajo Aguan. The Government reported to the IACHR that the Special Unit has prosecuted several cases and obtained two convictions against perpetrators of human rights violations. Luis Lemus, 'Unidad Especial Investiga Muertes Violentas en el Bajo Aguan', *La Prensa* (21 May 2014), <http://www.laprensa.hn/honduras/regionales/711248-98/unidad-especial-investiga-muertes-violentas-en-el-bajo-aguan> (accessed 30 April 2018); Annual Report 2016, Chapter V Follow Up on Recommendations issued by the IACHR in the Report on the Situations of Human Rights in Honduras, IACHR, para 156, <http://www.oas.org/es/cidh/docs/anual/2016/indice.asp> (accessed 30 April 2018).

⁴⁰ Human Rights Watch, note 25.

⁴¹ Rules for the Control of Private Security Service 2009 (Honduras), <http://www.tsc.gob.hn/leyes/Reglamento%20para%20el%20control%20de%20los%20servicios%20privados%20de%20seguridad.pdf> (accessed 30 April 2018).

⁴² Nancy Arévalo, 'Unas 70 Mil Armas Están en Manos de Empresas de Seguridad Privada', *Once Noticias* (26 April 2017), <http://www.oncenoticias.hn/unas-70-mil-armas-estan-en-manos-de-empresas-de-seguridad-privada> (accessed 30 April 2018).

⁴³ Denisse Rodriguez, 'Regularán a Más de 70,000 Guardias de Seguridad Privada', *La Prensa* (21 April 2017), <http://www.laprensa.hn/honduras/1064336-410/regularan-a-mas-de-70000-guardias-de-seguridad-privada> (accessed 30 April 2018).

⁴⁴ 'La Conflictividad se Reaviva en Bajo Aguan', *Proceso Digital* (31 August 2017), <http://www.proceso.hn/portadas/10-portada/la-conflictividad-se-reaviva-en-el-aguan.html> (accessed 30 April 2018); 'Asesinan a Campesino en el Bajo Aguan', *La Tribuna* (21 September 2017), <http://www.latribuna.hn/2017/09/21/asesinan-campesino-aguan> (accessed 30 April 2018).

⁴⁵ Resolve, 'Tragadero Grande: Land, Human Rights, and International Standards in the Conflict Between the Chaupe Family and Minera Yanacocha' (28 September 2016), http://www.resolve.org/site-yiffm/files/2015/08/YIFFM-report_280916-Final.pdf (accessed 30 April 2018); GRUFIDES, 'Police in the Pay of Mining Companies' (December 2013), <http://www.grufides.org/sites/default/files/documentos/documentos/Report%2520Eng.compressed.pdf> (accessed 30 April 2018).

⁴⁶ Ibid.

that Yanacocha hired from 2012 to 2016.⁴⁷ Securitas guards allegedly evicted local peasants by harassing and intimidating them, so that Yanacocha could have access to the land needed to construct the Conga gold mine.⁴⁸

Moreover, Minera Yanacocha entered into a secret agreement with the Peruvian police from 2011 until 2015 to provide private security services and rapid large-scale deployment of police units against demonstrators.⁴⁹ Under this agreement, the police acting as private security guards intimidated and harassed local communities, without regard for international human rights standards.⁵⁰ Both the police and Securitas guards have been accused of violent clashes with the Chaupe family members, using disproportionate force against them.⁵¹ The police and Securitas failed to provide access to remedy to the community for these violations.⁵²

Furthermore, the United Nations (UN) working group on the use of mercenaries investigated the case of Father Marco Arana, a priest who leads the Training and Intervention Group for Sustainable Development (GRUFIDES), a large human rights and environmental movement in Cajamarca. Father Arana and other GRUFIDES activists reported harassment by Forza, another PSC hired by Minera Yanacocha. Forza was founded in 1991 by former Peruvian navy officers and in 2007 was acquired by Securitas.⁵³ Forza followed and monitored Father Arana, GRUFIDES members, and members from other CSOs.⁵⁴ Moreover, Forza has been accused of using violence and disproportionate force against peasants' demonstrations, killing and wounding them.⁵⁵ Yanacocha has stated that Forza has acted on its own, without their authorization to carry out these actions.

In 2014, the Inter-American Commission on Human Rights included the Chaupe family as part of a wider precautionary measure to protect activists involved in protests against Conga gold mine exploitation.⁵⁶ Peru confirmed special measures to guarantee

⁴⁷ Oxfam, 'The Politics of Poverty' (28 September 2016), <https://politicsofpoverty.oxfamamerica.org/2016/09/new-report-same-problems-at-peruvian-mine> (accessed 30 April 2018).

⁴⁸ EarthWorks, 'Newmont's Own Investigation Shows it Violated International Standards and Its Own', *Mining* (28 September 2016), <http://www.mining.com/web/worlds-2nd-largest-gold-mining-companys-own-investigation-shows-it-violated-international-standards-and-its-own> (accessed 30 April 2018).

⁴⁹ Comunicadora Nacional de Derechos Humanos, 'Policía Nacional Sí Presta Servicios a Empresas Mineras, Brindándoles Protección y Seguridad' (3 November 2016), <http://derechoshumanos.pe/2016/11/policia-nacional-si-presta-servicios-a-empresas-mineras-brindandoles-proteccion-y-seguridad> (accessed 30 April 2018); Red Intersindical, 'Continúan Ataques Contra Campesinos en el Bajo Aguan' (6 October 2017), <http://www.intersindicalhn.org/sector-campesino/continuan-ataques-contra-campesinos-en-el-bajo-aguan> (accessed 30 April 2018).

⁵⁰ EarthWorks, note 48.

⁵¹ Resolve, note 48.

⁵² EarthWorks, note 48.

⁵³ Securitas, 'Nuestra Historia', <http://www.securitasperu.com/nosotros/nuestra-historia/nuestra-historia/> (accessed 30 April 2018).

⁵⁴ Angel Paez, 'Peru: UN Mission Probes Private Security Groups', *CorpWatch* (7 February 2007), <http://corpwatch.org/article.php?id=14350> (accessed 30 April 2018); 'Peru: Una Empresa de Seguridad Privada Expiaba a Organizaciones Sociales', *La Haine* (11 March 2009), http://www.lahaine.org/mm_ss_mundo.php/peru-una-empresa-de-seguridad-privada-es (accessed 30 April 2018).

⁵⁵ 'Empresa de Seguridad Forza Enfrenta una Investigación Legislativa por Posible Abuso', *El Comercio* (9 Febrero 2009), <http://archivo.elcomercio.pe/politica/gobierno/supuesto-abuso-empresa-seguridad-forza-enfrenta-investigacion-legislativa-noticia-243703> (accessed 30 April 2018); OCMAL, 'Que Minera Yanacocha Prescinda de los Servicios de Forza' (1 July 2009), <https://www.ocmal.org/4845> (accessed 30 April 2018).

⁵⁶ Inter-American Commission of Human Rights, 'Leaders of Peasant Communities of Cajamarca, Peru', Precautionary Measures 452/11 (5 May 2014).

the family members' safety and personal integrity.⁵⁷ In light of these circumstances, Peru issued an Executive Order No. 1,213, 2015, regulating private security services and prohibiting the army or police agents from participating, save for narrow exceptions, with PSCs, including working for or holding stocks in the companies.⁵⁸ Furthermore, PSCs can only operate under authorization of the national authority for private security services and weapons (Sucamec), which could fine business enterprises that acquire private security services from unauthorized PSCs.⁵⁹ However, local groups allege that these limitations on PSCs are not respected in practice.⁶⁰

C. Guatemala: Mines and Indigenous People

After the peace agreements of 1996 ended a decades-long internal armed conflict and the military cut its ranks by nearly two-thirds,⁶¹ PSCs proliferated in Guatemala⁶² with a current estimate of 80,000 to 200,000 private security personnel.⁶³ This increase was evident in many conflicts between local communities and extractive industries operating in indigenous territories. For example, conflicts and security issues arose around the Fenix Mining Project, owned by the Canadian mining company HudBay Minerals Inc. and HMI Nickel Inc. (HMI) managed by Compañía Guatemalteca de Níquel S.A. (CGN), located in El Estor, a region with Maya Q'eqchi' communities.

This conflict is illustrated by three major human rights cases currently pending in Canadian courts. The first case, *Angelica Choc v HudBay Minerals Inc.*, regards the murder of Adolfo Ich, a community leader that Fenix's private security agents allegedly shot during a forced violent eviction.⁶⁴ The second case, *German Chub Choc v HudBay Minerals Inc.*, arose out of a shooting, allegedly by mine company security personnel, which paralysed a community member, German Chub.⁶⁵ The third case, *Margarita Caal Caal v HudBay Minerals Inc.*, resulted from the gang rape of 11 Maya Q'eqchi' women by Fenix' private security, police and military agents during a forced eviction from their farms and homes in Lote Ocho, where the Fenix Project operated.⁶⁶ The plaintiffs in all three cases argue that HMI was negligent and careless in directing, controlling and

⁵⁷ Resolve, note 45.

⁵⁸ 'Policía ya no Dará Resguardo a las Empresas Particulares', *La República* (25 September 2015), <https://larepublica.pe/en-portada/884126-policia-ya-no-dara-resguardo-a-las-empresas-particulares> (accessed 30 April 2018).

⁵⁹ 'Pasarán al Retiro a Policías que Brinden Seguridad Privada sin Autorización', *RPP* (25 September 2015), <http://rpp.pe/lima/actualidad/pasaran-al-retiro-a-policias-que-brinden-seguridad-privada-sin-autorizacion-noticia-839048> (accessed 30 April 2018).

⁶⁰ Observatorio de Conflictos Cajamarca, Conflicto Minera-Familia Chaupe-Minera Yanacocha, http://www.grufides.org/sites/default/files/Documentos/fichas_casos/CONFLICTO%20MINERO%20FAMILIA%20CHAUPE_0.pdf (accessed 10 September 2018).

⁶¹ Kinosian and Bosworth, note 2, 6.

⁶² Boris Saavedra, 'Private Security in Guatemala: The Case of Supervision and Control', *Opera* (8 October 2014), <http://revistas.uexternado.edu.co/index.php/opera/article/view/3964/4382> (accessed 30 April 2018).

⁶³ Kinosian and Bosworth, note 2, 6.

⁶⁴ Susana C Mijares Peña, 'Human Rights Violations by Canadian Companies Abroad: Choc v Hudbay Minerals Inc.' (2014) 5 *Western Journal of Legal Studies* 1, 11.

⁶⁵ *Ibid.*

⁶⁶ Jion Yi, 'Holding Canadian Corporations Accountable for Guatemalan Human Rights Violations: Skye Resources and Hudbay', *Council on Hemispheric Affairs* (28 June 2016), <http://www.coha.org/holding-canadian-corporations-accountable-for-guatemalan-human-rights-violation-skye-resources-and-hudbay> (accessed 30 April 2018).

supervising the private security agents who committed the crimes.⁶⁷ Moreover, the plaintiffs stated that HMI did not make reasonable efforts after the violent evictions to investigate the use of force and subsequent human rights abuses.⁶⁸

The victims have sought remedy before Canadian courts because of lack of access to an effective remedy at the local level. Guatemala's justice system suffers from a lack of judicial independence, corruption and extreme backlogs, which contribute to high levels of impunity.⁶⁹ Guatemala also has a convoluted regulatory system for private security services. In 1970, the first statutory regulation of PSCs was enacted and later amended in 1997, to separate private security services from those of the police. In 2010, Congress enacted the Decree 52-2010⁷⁰ to regulate PSCs, including establishing licensing and education requirements, including training on the use of force and human rights.⁷¹ However, these regulations have not been effectively enforced, due to both the weak judiciary and the overwhelming amount of private security guards in the country.⁷² The presence of what is estimated to be a substantial number of unregistered security companies adds to the difficulties in enforcing these regulations.⁷³

D. Colombia: Multinationals and Paramilitaries

For decades, Colombia's fertile and mineral-rich lands have attracted multinational extractive and agricultural businesses, such as coal mining companies and banana plantations. Because these businesses have carried out operations in high-conflict zones, they have contracted with PSCs to protect their personnel and assets.⁷⁴ Due to the complex dynamics of Colombia's internal armed conflict, some extractive and monoculture companies have been associated with the United Self-Defence Forces of Colombia (AUC) paramilitary, a right-wing illegal armed group formed in the late 1990s to protect private businesses and land from local communist guerrillas, such as the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN).⁷⁵

For example, Drummond Company, Inc. is a US-based coal company, whose Colombian subsidiary, Drummond Ltda., owns and operates coal mines and transportation infrastructure in the departments of Magdalena and Cesar.⁷⁶ Based on the testimony of former AUC leaders and Drummond contractors made under oath in

⁶⁷ Mijares Peña, note 64, 12.

⁶⁸ Ibid.

⁶⁹ Human Rights Watch, 'World Report 2015: Guatemala', <https://www.hrw.org/world-report/2015/country-chapters/guatemala> (accessed 30 April 2018).

⁷⁰ Private Security Services Act 2010 (Guatemala), <http://ww2.oj.gob.gt/es/QueEsOJ/EstructuraOJ/UnidadesAdministrativas/CentroAnalisisDocumentacionJudicial/cds/CDs%20leyes/2010/pdfs/decretos/D052-2010.pdf> (accessed 30 April 2018); Governmental Accord No. 417 on Regulation of the Private Security Services Act 2013, <http://digessp.gob.gt/wp-content/uploads/2016/04/Acuuerdo-Gubernativo-417-2013.pdf> (accessed 30 April 2018).

⁷¹ Kinosian and Bosworth, note 2, 6.

⁷² José Patzan, 'Policías Privadas No Cumplen Ley', *Prensa Libre* (5 January 2017), <https://www.pressreader.com/guatemala/prensa-libre/20170105/282226600401601> (accessed 30 April 2018); Saavedra, note 62.

⁷³ Kinosian and Bosworth, note 2, 6.

⁷⁴ Human Rights Watch, note 25, 12.

⁷⁵ 'Profiles: Colombia's Armed Groups', *BBC News* (29 August 2013), <http://www.bbc.com/news/world-latin-america-11400950> (accessed 30 April 2018).

⁷⁶ Drummond, <http://www.drummondco.com/our-products/coal/mines> (accessed 30 April 2018).

legal proceedings, victims and CSOs have established that Drummond's operations in Colombia supported AUC illegal activities.⁷⁷ From 1999 to 2004, the AUC harassed, threatened, killed and forcibly displaced peasants from the Mechoacan rural zone, adjacent to Drummond's La Loma mining project.⁷⁸ Additionally, Mechoacan lands were allegedly transferred to Drummond, through fraudulent administrative proceedings by corrupt government officials linked to the AUC.⁷⁹

Drummond directly benefited from AUC's operations, as they 'cleared the path for land to be sold to Drummond for the expansion of its mining projects'.⁸⁰ Although Drummond denied the allegations⁸¹ and one case tried in US courts has been dismissed,⁸² a former Drummond contractor and his assistant were convicted in Colombia for providing support to the AUC in the killing of two union leaders.⁸³ The former Head of Industrial Relations at Drummond was also charged with the murder of the union leaders (a final court ruling is still pending).⁸⁴ Moreover, in 2016 a US Court found that claims against Drummond's officers could be litigated and a decision is pending.⁸⁵ In October 2018, the Colombian Transitional Justice Prosecutor reopened a criminal investigation into eight high-level Drummond officials regarding alleged payments to the AUC.⁸⁶ Drummond has denied any relationship with AUC in Colombia.⁸⁷

In addition, the multinational banana company Chiquita Brands admitted in 2007 that it paid the AUC from 1997 to 2004 to help them protect their fields and acquire new land to expand their banana monoculture farms in the Uraba zone, in the northern part of Colombia.⁸⁸ During these years, the AUC harassed, killed and forcibly disappeared peasants, union leaders, social activists, workers and political leaders

⁷⁷ PAX, 'The Dark Side of Coal' (30 June, 2014), <https://www.paxforpeace.nl/publications/all-publications/the-dark-side-of-coal> (accessed 30 April 2018); Banktrack, 'Drummond and Paramilitary Violence in Colombia' (May 2016), https://www.banktrack.org/download/drummond_human_rights_impact_briefing_160525_pdf_pdf/160525_drummond_case_study_final.pdf (accessed 30 April 2018).

⁷⁸ PAX, note 77, 72–73.

⁷⁹ Ibid, 74.

⁸⁰ Banktrack, note 77.

⁸¹ Steven Dudley, 'Drummond Denies Link to Armed Group' (24 April 2007), <http://www.miamiherald.com/news/nation-world/world/americas/article1927976.html> (accessed 30 April 2018).

⁸² *Jane Doe v Drummond Company* US Ct of App 11th Cir No. 13-15503 (2015).

⁸³ 'Colombian Judge Convicts Ex-Contractor in Drummond Union Leader Killing', *Fox News* (6 February 2013), <http://www.foxnews.com/world/2013/02/06/colombian-judge-convicts-ex-contractor-in-drummond-union-leader-killing.html> (accessed 30 April 2018).

⁸⁴ Emma Rosser, 'Drummond Executive Arrested Over Paramilitary Murder Charges', *Colombia Reports* (26 May 2015), <https://colombiareports.com/drummond-executive-arrested-over-paramilitary-murder-charges> (accessed 30 April 2018).

⁸⁵ 'Melo et al. v. Drummond Company, Inc.', *International Rights Advocates*, <http://www.iradvocates.org/case/latin-america-colombia/melo-et-al-v-drummond-company-inc> (accessed 19 September 2018). *Melo et al. v. Drummond Company Inc* US Ct of App 11th Cir No. 16-10921 (2016), <http://iradvocates.org/sites/iradvocates.org/files/09.27.16%20Opinion%20Issued%20on%20the%20Courts%20own%20Motion%20Opinion.pdf>.

⁸⁶ El Tiempo, 'El fantasma paramilitar de la Drummond revive' (28 October 2018), <https://www.eltiempo.com/justicia/investigacion/le-reviven-a-la-drummond-el-fantasma-paramilitar-en-colombia-286474> (accessed 10 November 2018); Reuters, 'Colombia calls Drummond coal officials to testify on paramilitaries' (30 October 2018), <https://www.reuters.com/article/us-colombia-drummond-court/colombia-calls-drummond-coalofficials-to-testify-on-paramilitaries-source-idUSKCN1N42NI> (accessed 10 November 2018).

⁸⁷ Drummond, 'Comunicado sobre investigación', <http://www.drummondltd.com/comunicadosobre-investigacion> (accessed 10 November 2018).

⁸⁸ 'Chiquita Lawsuits (re Colombia)', *Business & Human Rights Resource Center*, <https://www.business-humanrights.org/en/chiquita-lawsuits-re-colombia> (accessed 30 April 2018).

while funded by Chiquita Brands.⁸⁹ Chiquita Brands pled guilty to the federal crime of funding the AUC⁹⁰ even after being designated as a terrorist organization, and settled to pay a fine of US\$25 million to the US Department of Justice.⁹¹ In August 2018, the Colombian Attorney General indicted 14 Chiquita Brands executives for aggravated criminal conspiracy.⁹²

The role of paramilitary groups as private security forces led to unique aspects of Colombia's legal framework for PSCs. PSC training requirements have a strong emphasis on human rights, but indicative of the legacy of the armed conflict, the licensing of PSCs is conducted by the Ministry of Defence.⁹³

III. THE INTERNATIONAL CODE OF CONDUCT AND ITS ASSOCIATION: RELEVANCE TO LATIN AMERICA

The aforementioned cases of human right abuses show that the Latin American region is in need of better controls for private security services and robust mechanisms to hold PSCs responsible for violations. These cases illustrate the problems regarding PSCs in the region that work at extractive sites, such as lack of vetting, impunity for crimes against local populations, and the blurring of lines between police, illegal armed groups and PSCs.

The International Code of Conduct and its Association offer a human rights framework for PSC operations that, if effectively implemented, could help prevent and remediate these types of human rights violations. The Swiss government launched the International Code of Conduct for Private Security Providers' Association (ICoCA) as a multi-stakeholder initiative and independent mechanism mandated to oversee the implementation of the Code and the responsible provision of security services⁹⁴ and 'to ensure protection and provide remedy to victims of abuse by private security providers'.⁹⁵ The following subsection will elaborate on the relevant international initiatives that have served as background for creating the ICoC, and will highlight the ICoCA's relevant features for PSCs operating in Latin America whose clients include extractive companies.

⁸⁹ Matt Kennard, 'Chiquita Made a Killing from Colombia's Civil War', *Pulitzer Center* (27 January 2017), <http://pulitzercenter.org/reporting/chiquita-made-killing-colombias-civil-war> (accessed 30 April 2018).

⁹⁰ 'Chiquita Admits to Paying Colombia Terrorists', *NBC News* (15 March 2007), http://www.nbcnews.com/id/17615143/ns/business-us_business/t/chiquita-admits-paying-colombia-terrorists/#.WaSizK1DnfY (accessed 30 April 2018).

⁹¹ Based on Chiquita Brands' plea deal with the government, a class-action lawsuit was filed on behalf of 1,500 Colombian victims of AUC operations against Chiquita Brands with a US Federal District Court in Florida under the Alien Tort Statute. After a convoluted start, the Court admitted the case to trial, as the judge found that the victims would not be able to seek redress in Colombian courts safely. EarthRights, 'Doe v. Chiquita Brands International', <https://www.earthrights.org/legal/doe-v-chiquita-brands-international> (accessed 30 April 2018).

⁹² Sue Reisinger, '3 US Execs Indicted in Chiquita Terrorist Funding Probe in Colombia', *Corporate Counsel* (10 September 2018), <https://www.law.com/corpcounsel/2018/09/10/three-u-s-execs-indicted-in-chiquita-terrorist-funding-probe-in-colombia/?sreturn=20180815102122> (accessed 19 September 2018); Alejandra Bonilla, 'Los pagos que Chiquita Brands habría hecho a los paramilitares', *El Espectador* (1 September 2018), <https://www.elespectador.com/noticias/judicial/los-pagos-que-chiquita-brands-habria-hecho-los-paramilitares-articulo-809622> (accessed 19 September 2018).

⁹³ Kinosian, note 2, 6.

⁹⁴ ICoCA, 'Promoting Responsible Private Security', <https://www.icoca.ch> (accessed 19 September 2018).

⁹⁵ ICoCA, 'The ICoC Association', <https://www.icoca.ch/en/icoc-association> (accessed 30 April 2018).

A. Complementary Initiatives to the ICoC and ICoCA

The ICoC grew out of discussions at the international level about how to fill in gaps in the variety of frameworks and international standards applicable to the problem of human rights abuses committed by corporations in general, and PSCs in particular. While the UN Guiding Principles on Business and Human Rights apply to all business corporations regardless of their size or type of business activities, the Voluntary Principles on Security and Human Rights, the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, and a potential binding treaty currently being discussed by the UN Working Group on the use of mercenaries, seek to regulate the private security industry. These initiatives reflect competing but potentially complementary approaches advanced by governments, the security industry, regional organizations, the United Nations, and intergovernmental organizations.⁹⁶

1. UN Guiding Principles on Business and Human Rights

The international community has long sought solutions to human rights abuses by businesses and the persistent impunity around these violations. In 2011 the UN Human Rights Council endorsed⁹⁷ the Guiding Principles on Business and Human Rights ('Guiding Principles' or UNGPs),⁹⁸ and since then its 'three pillars' approach – protect, respect and remedy⁹⁹ – has become a widely accepted framework for addressing business activities that may have an impact on human rights.¹⁰⁰

Under the UNGPs,¹⁰¹ the corporate responsibility to respect human rights exists independently and in addition to states' duties, as a baseline expectation of all business activities.¹⁰² Moreover, corporations should seek to prevent or mitigate adverse human rights impacts linked to their activities or business relationships with third parties.¹⁰³ To comply with these responsibilities, business enterprises should implement a policy commitment to meet their responsibility to respect human rights; conduct human rights due diligence to identify, prevent, mitigate and address their impacts on human rights; and enable the remediation of adverse human rights impacts that they have caused or to which they contributed.¹⁰⁴ As discussed below, the Principles on due diligence¹⁰⁵ and remedy¹⁰⁶ are particularly relevant to the ICoCA.

⁹⁶ Jose L Gómez del Prado, 'A U.N. Convention to Regulate PMSCs' (2012) 31 *Criminal Justice Ethics* 262, 264.

⁹⁷ The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 6 June 2011; UN Doc. A/HRC/RES/17/4.

⁹⁸ Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) (hereinafter 'Guiding Principles').

⁹⁹ UN HRC, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/8/5, 7 April 2008, paras 17–26.

¹⁰⁰ Larry Catá Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprises Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All' (2015) 38 *Fordham International Law Journal* 457, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2382&context=ilj>.

¹⁰¹ UNGPs, note 98, 6 and 15

¹⁰² UN HRC A/HRC/8/5, note 98.

¹⁰³ UNGPs, note 98, 8 and 14–15.

¹⁰⁴ *Ibid.*, 8 and 16–17.

¹⁰⁵ *Ibid.*, 17.

¹⁰⁶ *Ibid.*, 29–31.

2. UN Working Group on the Use of Mercenaries

The United Nations Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination (hereinafter ‘Working Group’) has the mandate to study human rights violations committed by PSCs.¹⁰⁷ Although the Working Group has strongly supported ICoCA’s work,¹⁰⁸ the Working Group has also advocated for the establishment of a legally binding instrument since 2010.¹⁰⁹ The proposed draft Convention on Private Military and Security Companies (Convention) seeks to establish obligations for state parties to regulate private military and security companies, such as a centralized licensing system, mandatory legal training, arms regulation, and a remedy and redress mechanism for victims.¹¹⁰

However, disagreements among states over the proposed provisions have been an obstacle to building consensus on the draft Convention. For example, states have different views on the extent to which national security functions should be granted to the private sector.¹¹¹ Moreover, countries with large private security industries, like the US and the UK, opposed the convention.¹¹² Establishing jurisdiction for a binding mechanism within member states also presents a significant challenge.¹¹³

Consequently, for the time being there is more momentum around voluntary initiatives, such as the ICoC, than around the proposed Convention. However, a future binding treaty may eventually be a helpful complementary mechanism to the ICoCA.¹¹⁴

3. Voluntary Principles

The Voluntary Principles on Security and Human Rights (the ‘Voluntary Principles’ or ‘VPs’) are an important complement to the ICoCA in the context of the extractive industry. The VPs provide standards to extractive companies on maintaining the security of their operations while respecting and promoting human rights.¹¹⁵ The VPs seek to

¹⁰⁷ UN Human Rights Council, ‘Open-Ended Intergovernmental Working Group to Elaborate the Content of an International Regulatory Framework, Without Prejudging the Nature Thereof, Relating to the Activities of Private Military and Security Companies’, <https://www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitaryIndex.aspx> (accessed 18 September 2018).

¹⁰⁸ UN Human Rights Council, ‘Mercenarism and Private Military and Security Companies’ (2018), <https://www.ohchr.org/Documents/Issues/Mercenaries/WG/MercenarismandPrivateMilitarySecurityCompanies.pdf> (accessed 18 September 2018).

¹⁰⁹ UN Human Rights Council OEIGWG, note 107.

¹¹⁰ UN Working Group on the Use of Mercenaries, ‘Concept Note on a Possible Legal Binding Instrument,’ 4–8, <https://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/IssuesFocus.aspx> (accessed 18 September 2018).

¹¹¹ Jose L Gomez del Prado, note 96, 263, 272.

¹¹² DeWinter-Schmitt, note 15, 2. Stuart Wallace, ‘Private Security Companies and Human Rights: Are Non-Judicial Remedies Effective?’ (2017) 35 *Boston University International Law Journal* 69, 85.

¹¹³ Jose L Gomez del Prado, note 111.

¹¹⁴ Compare with the current ‘zero draft’ of the potential binding treaty on business and human rights, which does not mention private security specifically, but many of its provisions would have relevance to this field, including right to remedy (Article 8) and due diligence (Article 9), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (accessed 12 September 2018).

¹¹⁵ Voluntary Principles on Security and Human Rights, ‘Introduction’, <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles> (accessed 12 September 2018). To date, governments of 10 countries, 30 companies, and 11 NGOs around the world have engaged with the Voluntary Principles Initiative. Voluntary Principles on Security and

incentivize companies to join to enhance their reputation and to be able to take advantage of the sharing of best practices.¹¹⁶

Although the VPs are directed at extractive companies, i.e., the clients for PSCs, as with other MSIs, the VPs also welcome civil society organizations and states as participants. Thus far the participant states from the Latin American region are Argentina and Colombia, out of a total of ten states.¹¹⁷ Several multi-national mining companies that operate in Latin America, including Newmont mining (discussed above in the Peru case), are Voluntary Principles participants.¹¹⁸

The VPs have been important for advancing best practices and expanding awareness of the need to prevent human rights abuses in the extractive and energy sectors. However, the VPs do not provide for a mechanism to independently monitor, evaluate or ensure compliance; the only monitoring or evaluation is voluntarily self-reported by the members.¹¹⁹ As shown by the example above regarding Newmont's operation in Peru, mere membership in the VPs has not prevented abuse by PSCs hired by VP participants. Therefore, stakeholders should urge participants to complement the VPs by engaging with other relevant MSIs, like the ICoCA. Such a complementary, multi-pronged approach is consistent with the VPs' affirmation that private security should act in a lawful manner consistent with, *inter alia*, 'emerging best practices developed by Companies, civil society, and governments'.¹²⁰

4. The Montreux Document

The direct predecessor to the ICoC is The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (Montreux Document). As its name indicates, the Montreux Document endeavours to have states regulate private military and security companies (PMSCs)' activities when operating in an armed conflict zone.¹²¹ This reflects its origins as a reaction to abuses committed by private military contractors during the aftermath of the US-led invasion of Iraq in 2003.¹²² In this context, it is unsurprising that no Latin American states were involved in its

(Footnote continued)

Human Rights, <http://www.voluntaryprinciples.org/wp-content/uploads/2018/03/VPs-Fact-Sheet-March-2018.pdf> (accessed 12 September 2018).

¹¹⁶ Companies and the Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/VPs_Companies_Fact_Sheet_-_129742_v1_FHE-DC.pdf (accessed 12 September 2018).

¹¹⁷ Voluntary Principles on Security and Human Rights, 'For Governments', <http://www.voluntaryprinciples.org/for-governments> (accessed 12 September 2018).

¹¹⁸ Ibid.

¹¹⁹ Ben Collins et al, *The New Regulators? Assessing the Landscape of Multi-Stakeholder Initiatives*, MSI integrity (June 2017), 14–16, <https://msi-database.org/data/The%20New%20Regulators%20-%20MSI%20Database%20Report.pdf>.

¹²⁰ Voluntary Principles on Security and Human Rights, 'Interactions between Companies and Private Security', <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles> (accessed 8 October 2018).

¹²¹ Confédération Suisse, 'The Montreux Document', <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html> (accessed 19 September 2018).

¹²² Paul Pryce, 'Making the Most of the Montreux Document' (12 May 2018), <https://www.offiziere.ch/?p=33620> (accessed 25 August 2018).

drafting.¹²³ However, it is now seen as a set of best practices for states to fulfil their obligations to protect human rights at a national level regarding private security, even if such states are not experiencing armed conflict,¹²⁴ thus making it relevant for Latin America's current political and social context.¹²⁵ Thus far, four Latin America states – Chile, Costa Rica, Ecuador and Uruguay – are Montreux Document participants.¹²⁶

In explaining the states' obligations, the Montreux Document draws upon international humanitarian law and human rights law, including the obligation to prosecute torture and other grave crimes committed by PMSCs.¹²⁷ The Document also specifies the obligation to require vetting of PMSC personnel to ensure that they do not have a history of human rights abuse or other crimes under international law.¹²⁸

The Montreux Document was well received by the private security industry.¹²⁹ However, the industry also noted the need for a standard that would be directly applicable to PSCs, rather than through states – seen as particularly necessary in operating environments with rule of law challenges where states were not complying with the Montreux Document.¹³⁰ The Swiss government responded by developing the ICoC.¹³¹

B. The ICoC and the ICoCA

While the Montreux Document is directed at states' regulation of PSCs, the ICoC is complementary in that it focuses specifically on the actions of PSCs and their personnel. The Code seeks to foster better governance, compliance and accountability of PSCs.¹³² The ICoC embraces the UNGPs in its Preamble and affirms that PSCs must abide by the Respect, Protect and Remedy framework, establishing undertakings for PSCs to comply with business and human rights standards.¹³³ The ICoC was finalized and signed by 58 PSCs in 2010.¹³⁴

¹²³ Confédération Suisse, 'Participating States of the Montreux Document', <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html> (accessed 15 September 2018).

¹²⁴ Taryn Priadko, 'Private Forces, Public Harm: Private Security Companies and International Law', *Australian Institute of International Affairs* (23 November 2014), <http://www.internationalaffairs.org.au/news-item/private-forces-public-harm-private-security-companies-and-international-law> (accessed 19 September 2018).

¹²⁵ Kinosian and Bosworth, note 2. Montreux Document Forum, '31 States were Represented at the Regional Meeting of the Montreux Document Forum (MDF) in San José, Costa Rica', <http://www.mdforum.ch/en/first-regional-meeting-lac> (accessed 19 September 2018).

¹²⁶ International Committee of the Red Cross, 'The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' (2 May 2011), <https://www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies> (accessed 19 September 2018).

¹²⁷ *Ibid.*, 14.

¹²⁸ *Ibid.*, 39 2.c, 28.c, 57.c.

¹²⁹ DCAF Mapping Study, note 3, 27.

¹³⁰ DeWinter-Schmitt, note 15.

¹³¹ DCAF Mapping Study, note 3, 27; DeWinter-Schmitt, note 15.

¹³² DCAF Mapping Study, note 3, 27.

¹³³ The International Code of Conduct for Private Security Service Providers, 'Preamble', para 2–3, https://www.icoca.ch/en/the_icoc#a-preamble (accessed 19 September 2018) (hereinafter ICoC).

¹³⁴ *Ibid.* Federal Department of Foreign Affairs (FDFA), 'International Code of Conduct for Private Security Providers Signed by Close to 60 Companies' (9 September 2010), <https://www.fdfa.admin.ch/eda/en/home/news/news-fdfa.html/content/eda/en/meta/news/2010/11/9/36144> (accessed 19 September 2018).

Although the ICoC does not replace, limit or alter the power of national authorities, national law or international law,¹³⁵ it aims to create better governance, compliance and accountability for PSCs by laying out their responsibilities in terms of international human rights and humanitarian law. PSCs who voluntarily accede to the Code by becoming members of the ICoCA commit to numerous obligations including to ‘exercise due diligence to ensure compliance with the law and with the principles contained in this Code’,¹³⁶ and the responsibilities to ‘respect the human rights of persons they come into contact with, including, the rights to freedom of expression, association, and peaceful assembly and against arbitrary or unlawful interference with privacy or deprivation of property’.¹³⁷ For example, according to the Code and consistent with international human rights standards, PSCs may only use proportional force when strictly necessary.¹³⁸ The Code contains prohibitions of: torture and other cruel, inhuman or degrading treatment or punishment;¹³⁹ sexual exploitation and abuse or gender-based violence;¹⁴⁰ human trafficking;¹⁴¹ slavery and forced labour;¹⁴² hostage-taking, extrajudicial, summary or arbitrary executions;¹⁴³ and discrimination.¹⁴⁴ It also lays out requirements for due diligence in vetting of security personnel, i.e., conducting background checks and prohibiting those with criminal records from carrying weapons, and for training on human rights standards.¹⁴⁵ The ICoC also requires that PSCs establish effective grievance procedures for personnel and third parties to report, *inter alia*, violations of the Code.¹⁴⁶

The ICoCA aims to provide an inclusive forum for constructive dialogue with PSCs, in addition to ensuring that PSCs comply with specific human rights commitments outlined in the Code.¹⁴⁷ As with other MSIs, such as the VPs and the Montreux Document Forum, ICoCA’s membership has a tripartite structure composed of member PSCs, governments and CSOs, each of which will be discussed briefly in turn below. The three stakeholder pillars are equally represented on the Board of Directors.¹⁴⁸ In addition, the ICoCA at its discretion may grant a non-voting observer status¹⁴⁹

¹³⁵ ICoC, note 133, sec D-14.

¹³⁶ *Ibid*, sec E-21.

¹³⁷ *Ibid*.

¹³⁸ *Ibid*, sec F-29-32.

¹³⁹ *Ibid*, sec F-35-7.

¹⁴⁰ *Ibid*, sec F-38.

¹⁴¹ *Ibid*, sec F-39.

¹⁴² *Ibid*, sec F-40.

¹⁴³ *Ibid*, sec E-22.

¹⁴⁴ *Ibid*, sec F-42. ‘Signatory Companies will not, and will require that their Personnel do not, discriminate on grounds of race, colour, sex, religion, social origin, social status, indigenous status, disability, or sexual orientation.’

¹⁴⁵ *Ibid*, sec G-50-1, and 55.

¹⁴⁶ *Ibid*, sec G-67.

¹⁴⁷ Evgeni Moyakine, ‘From National and International Frustrations to Transnational Triumph? Hybrid Transnational Private Regulatory Regimes in the Industry of Private Military and Security Companies and Their Effectiveness in Ensuring Compliance With Human Rights’ (2015) 28 *Pacific McGeorge Global Business and Development Law Journal* 209, 211.

¹⁴⁸ ICoCA, ‘Promoting Responsible Private Security’ (February 2017), <https://www.icoca.ch/sites/default/files/resources/ICoCA-Overview.pdf> (accessed 30 April 2018).

¹⁴⁹ ICoCA, ‘Become a Member or Observer’, <https://www.icoca.ch/en/become-member-or-observer> (accessed 15 September 2018).

to academics, consultants, companies (except PSCs), industry trade associations, and non-government organizations.¹⁵⁰

In order to join ICoCA, PSCs must participate in a process whereby they certify that their systems and policies meet the principles and standards of the Code.¹⁵¹ Member PSCs also agree to participate in regular oversight through reporting, monitoring and assessment of performance.¹⁵² When PSCs continuously fail to meet their membership requirements and do not comply with the Code or recommended corrective action, the ICoCA may ultimately suspend their membership.¹⁵³ Where PSC clients have required ICoCA membership as a pre-requisite to bidding on or providing services under a contract, such suspension may adversely impact the PSCs ability to continue operations. A handful of Latin American PSCs are ICoCA members to date.¹⁵⁴

Government members of the ICoCA make a political commitment to the principles of the ICoC and to effective governance of the private security sector, including the standards set in the Montreux Document. There are currently seven such members: Australia, Canada, Norway, Sweden, Switzerland, the United Kingdom (UK), and the United States (USA).¹⁵⁵ State participation in the ICoCA is crucial to increase its legitimacy and ensure that it is robust enough to provide effective prevention and remedy of human rights abuses by PSCs.¹⁵⁶ However, mere membership by a state in the ICoCA, without further steps to effectively implement the ICoC in its national laws or regulations, would be insufficient to meet its obligations under the UNGPs.¹⁵⁷

CSO members commit to supporting the Association in promoting the full implementation of the Code at the local, national and international level. This may include: holding training on the Code and Association; reporting compliance concerns to the Association; and advocating for governments and other clients, through procurement processes, to commit to contracting with responsible private security. According to ICoCA, CSO members ‘play a key role in safeguarding the human rights focus of the Association’s core functions, and in ensuring that monitoring is carried out according to established human rights methodologies’.¹⁵⁸ CSOs can also assist affected communities in seeking remedy through ICoCA’s complaints process (see below), and/or invoke the Code in their litigation strategies for the enforcement of human rights, thereby advancing

¹⁵⁰ ICoCA, ‘Observers’, <https://www.icoca.ch/en/membership/observers#category-tid-819> (accessed 15 September 2018).

¹⁵¹ ICoCA, ‘Articles of Association’, article 11, https://www.icoca.ch/en/articles_of_association (accessed 19 September 2018). ICoCA, ‘Overview’, <https://www.icoca.ch/en/functions> (accessed 19 September 2018).

¹⁵² ICoCA, ‘Monitoring’, <https://www.icoca.ch/en/monitoring> (accessed 19 September 2018). ICoCA, ‘Reporting, monitoring and assessing Membership Requirement’, <https://www.icoca.ch/sites/default/files/uploads/ICoCA-Procedures-Article-12-Monitoring.pdf> (accessed 19 September 2018).

¹⁵³ *Ibid.*

¹⁵⁴ Centurion (Guatemala), Innovative Security Technologies (Trinidad and Tobago), Yantarni (Guatemala), Interglobal seguridad (Colombia), Siete24 (Colombia), Seguroc SA (Peru). ICoCA, ‘Membership’, <https://www.icoca.ch/en/membership> (accessed 19 September 2018).

¹⁵⁵ ICoCA, ‘Get Involved’, <https://www.icoca.ch/en/get-involved> (accessed 30 April 2018).

¹⁵⁶ Nigel White, ‘Regulation of the Private Military and Security Sector: Is the UK Fulfilling its Human Rights Duties?’ (2016) 16 *Oxford Human Rights Law Review* 585, 594.

¹⁵⁷ *Ibid.*, 595–596. Sorcha MacLeod, ‘Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-Plus’, (2015) *Netherland International Law Review* 120, 131.

¹⁵⁸ ICoCA, ‘Why Join the Association’, <https://www.icoca.ch/en/why-join-association> (accessed 30 April 2018).

the soft law mechanism towards a more legally binding instrument.¹⁵⁹ At the time of writing, three Latin American CSOs – Indepaz (Colombia), the Institute of Democracy and Human Rights of the Catholic University of Peru, and Socios Peru – are ICoCA members, out of a total CSO membership of 24.¹⁶⁰

Currently, the figures of Governments, CSOs and PSCs engaged in ICoCA show an overall imbalance between the stakeholders, as over 70 per cent of members are PSCs. Multi-stakeholder governance models require the full involvement of individuals or organizations that have interest in a common issue to address it on a consensus-based, transparent, accountable manner.¹⁶¹ The overwhelming majority of PSCs in the membership has raised concerns over the independence and impartiality of ICoCA,¹⁶² although rules about how the Board of Directors functions seek to avoid a potential disproportionate influence by any one pillar.¹⁶³

However, the stakeholder imbalance could also have an impact on ICoCA's funding. The Association receives financial support from three main sources: (i) voluntary contributions from member governments; (ii) annual membership dues from observers and member PSCs, scaled to their size and revenue,¹⁶⁴ and (iii) one-time joining fee from PSCs and CSOs.¹⁶⁵ As projected in the approved annual budget for 2018, ICoCA's largest source of funding comes from joining fees and membership dues, which at the time of writing are paid primarily by PSCs.¹⁶⁶ Nevertheless, ICoCA has received additional grants from observers and governments.¹⁶⁷ Funding from observers may be of concern given that PSC clients implicated in past human rights abuse, such as Newmont, are part of this group – see Peru case above.¹⁶⁸ Funding from a member government could also create a potential conflict of interest if a field-based review was conducted in its territory; however, these contributions are not project specific and will not exclusively fund field-based reviews in any particular country. Moreover, ICoCA has pledged to grow and diversify its fund base to ensure its independence and long-term sustainability.¹⁶⁹

¹⁵⁹ Lara Blecher, 'Codes of Conduct: The Trojan Horse of International Human Rights Law?' (2017) 38 *Comparative Labor Law and Policy Journal* 439. See also DeWinter-Schmitt, note 15.

¹⁶⁰ 'Membership', note 154.

¹⁶¹ Compendium, 'Multistakeholder Governance in the Field of Culture', <http://www.culturalpolicies.net/web/multi-stakeholder-governance.php> (accessed 19 September 2018).

¹⁶² Reema Shah, 'Beating Blackwater: Using Domestic Legislation to Enforce the International Code of Conduct for Private Military Companies', *Yale Law Journal*, 2567. Wallace, note 110.

¹⁶³ Within ICoCA's Board of Directors the three stakeholder pillars have equal voting power and, in general, a decision must be adopted by a majority of eight directors including at least two votes from each of the three stakeholder pillars. Articles of association, note 151, para 7.6.

¹⁶⁴ 'Observers', note 150.

¹⁶⁵ The PSCs joining fee is \$1000 USD and the CSOs joining fee is \$100, which can be waived. ICoCA, 'The Association', <https://www.icoca.ch/en/association> (accessed 19 September 2018).

¹⁶⁶ ICoCA, '2017–2018 Budget', <https://www.icoca.ch/sites/default/files/uploads/Budget%202017%20and%202018.pdf> (accessed 15 September 2018).

¹⁶⁷ ICoCA, '2016–2017 Annual Report', <https://icoca.li/sites/default/files/uploads/ICoCA%20Annual%20Report%202016-2017.pdf> (accessed 15 September 2018).

¹⁶⁸ 'Become a Member or Observer', note 149.

¹⁶⁹ ICoCA, 'Q2 2018 Board Meeting Minute' (22 and 23 May 2018), <https://icoca.ch/sites/default/files/resources/ICoCA%20Q2%202018%20Board%20Meeting%20Minutes.pdf> (accessed 15 September 2018).

C. The Potential Role of the ICoCA in Latin America

Practitioners and scholars have questioned the legitimacy of the private use of force.¹⁷⁰ PSCs shift the monopoly of legitimate violence out of the states' power¹⁷¹ and can contribute to the erosion of state control over security issues.¹⁷² In Latin America, the phenomenon of private security also promotes an 'inequality of security': wealthy businesses and individuals living in violent societies pay for safety that is out of reach of the average citizen, and in the process become less invested in improving public, collective security.¹⁷³ Notwithstanding these important public policy issues, practitioners also recognize that the proliferation of private security in Latin America is a reality that must be dealt with for the foreseeable future.¹⁷⁴ In a similar vein, the ICoCA does not take a position on the legitimacy or moral value of PSCs but rather recognizes industry growth and the services provided by PSCs in a variety of complex environments globally, including Latin America.¹⁷⁵

At the time of writing, however, only 8 per cent of ICoCA PSC members are from the region.¹⁷⁶ Given the private security problems illustrated by the case studies above, more Latin American stakeholders should engage with ICoCA to ensure that it can address the particular economic, legal and political contexts inherent in the relationship between PSCs and extractive companies in the region.

ICoCA's main features – certification, monitoring and complaints – will be described below to provide further context for the potential application in Latin America.

1. Certification

Currently, for PSCs to be eligible for membership they must commit to obtain an ICoCA certification.¹⁷⁷ As discussed below, some states require ICoCA membership as a pre-requisite to doing business with the government. More non-state clients are also promulgating similar requirements. As such, ICoCA certification may be an attractive business decision for PSCs.¹⁷⁸ At the time of writing, only 13 PSCs out of 94 have achieved full ICoCA certification, none of which are from Latin America, showing room for growth in this space.¹⁷⁹

ICoC affirms that in obtaining certification, member PSCs endorse the 'Protect, Respect and Remedy' framework of the UNGPs, making particular reference to 'due

¹⁷⁰ Kinosian and Bosworth, note 2. A/HRC/36/47, note 11, sec V-62.

¹⁷¹ Blackwell, note 1.

¹⁷² Karska, note 20.

¹⁷³ Kinosian and Bosworth, note 2, 8.

¹⁷⁴ *Ibid.*, 14.

¹⁷⁵ Telephone interview with Molly Gray, Law and Policy Manager, ICoCA (20 April 2018).

¹⁷⁶ 'Membership', note 154.

¹⁷⁷ While the certification procedure was developed and implemented, 102 PSCs signed the ICoC and they are currently deemed as Transitional Member PSCs and have maximum of two years to obtain ICoCA certification and become ICoCA Certified Members. Articles of Association, note 149, art 3.3.1; ICoCA, 'Certification', <https://icoca.ch/en/en/mandate/faq#Certification> (accessed 30 April 2018).

¹⁷⁸ ICoCA, 'Frequently Asked Questions', <https://www.icoca.ch/en/frequently-asked-questions#Membership> (accessed 19 September 2018).

¹⁷⁹ 'Membership', note 151.

diligence to avoid infringing the rights of others'.¹⁸⁰ Nevertheless, the ICoC does appear to follow all of the human rights due diligence obligations for corporations established in Guiding Principle No. 17,¹⁸¹ and does not expressly require PSCs to have a full-fledged human rights due diligence procedure in place to undertake a proper assessment of their human rights impacts.¹⁸² Although an in-depth comparative analysis between risk management and human rights due diligence schemes is outside the scope of this article, it can be noted that the ICoC approves of risk management procedures insofar they allow PSCs to 'deter, monitor, report, and effectively address adverse impacts to human rights'.¹⁸³ Under the ICoCA's certification procedure, the Board recognizes standards¹⁸⁴ that are consistent with the ICoC and defines for each standard additional requirements relative to PSCs human rights performance and impacts.¹⁸⁵

When considering whether ICoCA certification of PSCs in Latin America is needed, several socioeconomic variables must be considered. For instance, increasing numbers of military and police personnel are joining PSCs in search of higher salaries.¹⁸⁶ This is problematic when PSC guards who were previously trained by their government in the use of weapons and counterinsurgency operations apply the same methods for military operations to private security situations.¹⁸⁷ Moreover, some of these former soldiers may have post-traumatic and reintegration issues that PSCs do not assess or mitigate,¹⁸⁸ which can be an additional factor resulting in human rights violations when tensions arise between extractive industry clients and local communities.¹⁸⁹

Taking the above into consideration, the obligation of vetting under the Code¹⁹⁰ is particularly salient for Latin America. Many countries in the region experienced periods of dictatorships or internal armed conflict resulting in grave human rights abuses in recent decades.¹⁹¹ Ex-soldiers and demobilized fighters who remain within the security field often seek employment with PSCs. However, insufficient vetting procedures cannot guarantee that employees with credible allegations of human rights violations are effectively barred from PSC employment.¹⁹²

¹⁸⁰ ICoC, note 131, Preamble paras 2 and 3.

¹⁸¹ MacLeod, note 157, 135.

¹⁸² Wallace, note 112, 89.

¹⁸³ ICoC, note 133, Preamble para 6(d).

¹⁸⁴ The current Board-recognized standards are ISO 28007, PSC.1-2012, and ISO 18788. 'Certification', note 175.

¹⁸⁵ ICoCA, 'Principles & Procedures Article 11: 'Certification', <https://www.icoca.ch/sites/default/files/uploads/ICoCA-Procedures-Article-11-Certification.pdf> (accessed 19 September 2018). ICoCA, 'Apply for ICoCA Certification', <https://www.icoca.ch/en/apply-icoca-certification> (accessed 30 April 2018).

¹⁸⁶ Gómez, note 96.

¹⁸⁷ Antonie Perret, 'Private Security Trends and Challenges in Latin America [Student's Paper Series]' (2011) 37 *Western Hemisphere Security Analysis Center*, 6.

¹⁸⁸ Gómez, note 96.

¹⁸⁹ Buzatu, note 16; Perret, note 187.

¹⁹⁰ ICoC, note 133, sec G.

¹⁹¹ Belisario Betancur, 'From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador' (26 January 2001), <https://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf> (accessed 19 September 2018). Commission for Historical Clarification, 'Guatemala: Memory of Silence', https://www.aas.org/sites/default/files/migrate/uploads/mos_en.pdf (accessed 19 September 2018). Never Again: The National Commission on the Disappearance of Persons, http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_000.htm.

¹⁹² Kinosian and Bosworth, note 2, 7.

In this sense, it should be noted that the ICoCA reports that since 2015, it continues to develop, test and promote performance and compliance indicators for Code standards including the selection, vetting and training of personnel.¹⁹³ The indicators assist the ICoCA in assessing whether PSCs have proper selection and vetting procedures in place in addition to whether PSCs are actually implementing the procedures at the time of recruitment.¹⁹⁴ To evaluate selection and vetting compliance, the ICoCA considers whether or not personnel will carry weapons, the availability of background checks, and other sources of information such as public records, human rights reports, news reports, interviews with communities, prior job references and experience, among others, to ensure that PSCs conduct a meaningful evaluation of an applicant's physical and mental fitness to provide security services.¹⁹⁵ The ICoCA is also emphatic that selection and vetting processes are not initial evaluations only, but entail ongoing assessments to ensure that personnel retain the requisite fitness to abide by human rights standards throughout the duration of employment.¹⁹⁶

2. *Monitoring*

The confidentiality and secrecy surrounding PSC operations accentuate the need for transparency and accountability mechanisms.¹⁹⁷ The nature of private security operations involves PSCs handling confidential information of various sorts, from security schemes, intelligence methods, and firearms management, to client lists and personnel vetting and training. Moreover, rogue PSCs have implemented questionable legal practices to incorporate different firms when governments seek to regulate the industry or avoid responsibility for human rights violations.¹⁹⁸ These aspects could undermine compliance with the ICoC and pose serious challenges to monitoring by the ICoCA. Since the ICoCA's monitoring procedures were ratified relatively recently (in 2016), more information will be needed over time to accurately assess their effectiveness.

In spite of the potential challenges that monitoring ICoC compliance could face, the ICoCA endeavours to do so through remote monitoring – including by reviewing news articles, human rights reports, country reports and complaints it receives – and in-country missions or 'field-based reviews'.¹⁹⁹ Since 2016, the ICoCA has also worked to develop a company self-assessment (CSA) reporting system, regarding PSCs' policies and their actual implementation of the ICoC. Aligned with the performance and compliance indicators, the CSA system aims to guide PSCs through a self-assessment of their compliance with the Code, at the outset and in particular, with Code selection and vetting requirements.²⁰⁰ Although the ICoCA aims to publish the format and focus of the CSA

¹⁹³ Gray, note 175.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ Moyakine, note 147, 217.

¹⁹⁸ *Ibid.*, 222.

¹⁹⁹ Articles of Association, note 151, art 12. ICoCA, 'Procedures Article 12: Reporting, Monitoring and Assessing Performance and Compliance', <https://icoca.ch/sites/default/files/resources/ICoCAI-Procedures-Article-12-Monitoring.pdf> (accessed 30 April 2018).

²⁰⁰ *Ibid.*

reports,²⁰¹ it will not disclose PSC responses in order to encourage honest disclosure regarding implementation of the ICoC and to preserve the confidential dialogue with PSCs aimed at improving performance and addressing compliance concerns.²⁰² A problem with this is that it limits public oversight and diminishes CSOs' ability to keep track of PSCs' compliance with the ICoC. That being said, the CSA system and accompanying indicators provide transparent metrics for both the public and PSCs as to what should be expected with regard to compliance with the Code.²⁰³

Field-based reviews may be initiated by the ICoCA as a result of a compliance concern or at the request of a member of the Association – including government or CSO members.²⁰⁴ ICoCA has conducted reviews of more than ten member PSCs operating in Africa and the Middle East, which have largely focused on PSCs' compliance with selection, vetting and training requirements in the Code. The ICoCA reports that the reviews have informed its understanding of the challenges facing PSCs where background checks may be unavailable or unreliable.²⁰⁵ Such lessons learned could be useful tools for PSCs, states and civil society in Latin American countries where there may be similar problems regarding records.

At any point, but normally where compliance concerns arise, the ICoCA could enter into a confidential dialogue with PSCs to facilitate improvements of their performance and to identify and communicate implications of continued non-compliance.²⁰⁶ If a breach to the ICoC is identified, the ICoCA will request the non-compliant PSCs to take corrective actions within a specific period of time. Failing to take reasonable corrective actions or to act in good faith in accordance with the ICoC could enable the ICoCA to initiate suspension or termination proceedings.²⁰⁷

Although the private security industry has become susceptible to reputational damage due to allegation of human rights abuses,²⁰⁸ sanctions such as expulsion from the ICoCA remain insufficient to fully address these problems²⁰⁹ and more meaningful and effective mechanisms of accountability to control PSCs' operations are needed, like referral of non-compliant actors to national authorities both in host countries and origin countries.²¹⁰ Nonetheless, monitoring of PSCs by an international entity such as the ICoCA would be an improvement over the *status quo* in Latin America, where the fundamental problem with PSCs is the absence of effective governmental regulations and independent controls.²¹¹ Although most Latin American countries have adopted specific laws governing PSCs, these fail to provide in-depth oversight powers to public authorities or allocate sufficient budgetary resources to ensure accountability for private

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Gray, note 175.

²⁰⁴ Procedures Article 12: Reporting, Monitoring and Assessing Performance and Compliance, note 199.

²⁰⁵ Gray, note 175.

²⁰⁶ Procedures Article 12: Reporting, Monitoring, and Assessing Performance and Compliance, note 199.

²⁰⁷ Ibid.

²⁰⁸ MacLeod, note 157, 136.

²⁰⁹ Wallace, note 112, 97. White, note 156, 591.

²¹⁰ Dapgné Richemond-Barak, 'Can Self-Regulation Work? Lessons From the Private Security and Military Industry' (2014) 35 *Michigan Journal of International Law* 773, 800.

²¹¹ Blackwell, note 1.

security operations.²¹² As a result, PSCs have been functioning in Latin America with limited public oversight and a lack of transparency with regard to weapons control, recruitment of employees, and due diligence with respect to contracts and subsidiaries,²¹³ becoming ‘powerful entities operating outside the state’s control and often with impunity’.²¹⁴ Therefore, Latin America is in need of additional tools such as the ICoCA to promote respect for human rights by PSCs and accountability for abusive practices.²¹⁵

The ICoCA’s monitoring procedure could also empower communities and CSOs in Latin America to shed light on human rights abuses by PSCs, as it provides avenues to receive and act on human rights reports received during remote monitoring and field-based reviews. However, in the context of the extractive industry, ICoCA should be sensitive to potential tensions or social conflict when engaging with affected communities, given that such PSCs’ clients may be welcomed by some community members – for the perceived or actual economic opportunity they bring – and rejected by others because of perceived or actual environmental degradation, land rights disputes, or lack of consultation.²¹⁶ In particular, the ICoCA should consider the real risks that human rights defenders and activists may be facing in reporting on violations,²¹⁷ and take steps to ensure that they do not face reprisals for engaging with the Association. While the ICoCA does not have a formal mechanism for protecting human rights defenders, when requested it does ensure confidentiality and takes protection concerns into account when reviewing complaints (see below).²¹⁸

3. Complaints

The ICoCA requires companies to have grievance mechanisms in line with the UNGPs standards on remedy.²¹⁹ ICoCA’s complaints function and procedures endeavour to facilitate access to fair grievance procedures that offer remedies for individuals affected by PSCs’ operations.²²⁰ The ICoCA facilitates complainants pursuing the most effective avenue for receiving an appropriate remedy, advancing the remedy pillar of the UNGPs.²²¹ The ICoCA does not provide its own remedy procedure, but rather oversees the adequacy of member companies’ complaint procedures by providing guidance to

²¹² Bryden, note 18, 51.

²¹³ Gómez, note 96; Blackwell, note 1.

²¹⁴ Blackwell, note 1.

²¹⁵ ‘Outsourcing to Private Security Contractors Threatens Rights, UN Panel Warns’, *UN News* (14 September 2011), <https://news.un.org/en/story/2011/09/386572-outsourcing-private-security-contractors-threatens-rights-un-panel-warns> (accessed 30 April 2018).

²¹⁶ Inter-American Commission on Human Rights, ‘Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities’ (2015), para 15, <http://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf>.

²¹⁷ *Ibid.*, para 123, 124. White, note 156.

²¹⁸ Gray, note 175; <https://www.icoca.ch/en/register-a-complaint>.

²¹⁹ Comment of Meg Roggensack, ICoCA Board Member, at public event ‘The Explosive Growth of Private Security in Latin America’, 27 March 2018; <https://www.youtube.com/watch?v=LsZm5fGh92o&t=1635s> (1:17) (accessed 11 August 2018). See also ICoC Preamble.

²²⁰ Gómez, note 96; Blackwell, note 1. Articles of Association, note 151, art 13.

²²¹ ICoCA, ‘Procedures Article 13: Receiving and Processing Complaints’, <https://icoca.ch/sites/default/files/resources/ICoCA-Procedures-Article-13-Complaints.pdf> (accessed 30 April 2018).

companies in operating fair and accessible grievance procedures and to complainants in navigating access to remedy options. As a result, the ICoCA remains neutral in the process.

An individual, a group (employees or community members) or a representative of either (unions or NGOs) can make a complaint. If the complaint alleges harm, the ICoCA considers whether it also asserts criminal activity and whether there is a competent authority with jurisdiction to refer the case. The ICoCA further reviews the complaint and determines if the company's grievance mechanism meets the ICoC standards, such as whether it: establishes procedures for reporting violations of Code principles and applicable law; is 'fair, accessible, and offer[s] effective remedies'; and whether the Company 'investigate[s] allegations promptly, impartially and with due consideration to confidentiality'.²²² In this assessment, the ICoCA takes into account the environment the harm alleged, the adequacy of the company grievance procedure and the wishes of the complainant, in particular whether the complainant may be at risk or face protection concerns.²²³

If the PSC's grievance mechanism is adequate, the ICoCA informs the complainants of their options for pursuing their claim in addition to the company's complaint mechanism, such as NGOs mechanisms, arbitration, mediation, and administrative or judicial proceedings.²²⁴ If it is found to be inadequate, the complainants are likewise informed of alternative options and offered the ICoCA's 'good offices' to help resolve the dispute.²²⁵

Voluntary complaint procedures made available by companies have their drawbacks: they may intimidate claimants due to the existing imbalance between the parties, in terms of financial resources, access to information, and expertise, among other reasons.²²⁶ In addition to regulatory gaps in domestic law, companies could use these voluntary remedy programmes to block or avoid legal action, increasing impunity for human rights abuses.²²⁷ However, such complaint procedures may resolve disputes more efficiently than judicial mechanisms, particularly in Latin American countries dealing with serious rule of law challenges including long delays in case processing. In fact, the UNGPs recognize that non-judicial remedies complement and supplement judicial ones, especially where issues arise between companies and local communities that have not yet become legal disputes, but still need to be effectively addressed.²²⁸ In this context, the ICoCA's oversight of company complaint mechanisms may help strengthen them, provided it encourages the implementation of fair and effective procedures by its members.

²²² ICoC, note 133, art 67.

²²³ Gray, note 175.

²²⁴ Procedures Article 13: Receiving and Processing Complaints, note 121.

²²⁵ *Ibid.*

²²⁶ Human Rights Council, 'Summary of the Third Session of the Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies', A/HRC/WG.10/3/2 (2 September 2014), para 41.

²²⁷ *Ibid.*

²²⁸ Wallace, note 112, 74.

The ICoCA's guidance to victims on remedy might also be particularly helpful to human rights defenders in Latin America working on issues related to extractive projects – mining, hydroelectric, and increasingly, agribusiness such as monocultures.²²⁹ Defenders who advocate against precisely these types of projects are subject to threats, violence, harassment and the phenomenon of criminalization – the misuse of the justice system to unfairly prosecute or otherwise seek to restrict the work of human rights defenders, such as through the filing of frivolous lawsuits.²³⁰ While defenders in the Americas are criminalized for their legitimate work in defence of human rights in the face of extractive projects, they also report that the justice system does not fairly adjudicate their own claims against those affiliated with such projects. In this context, non-state-based judicial grievance mechanisms,²³¹ such as those facilitated by the ICoCA, could be better avenues in practice. The ICoCA's complaints system also offers the possibility for victims to remain anonymous,²³² which can help protect defenders at risk.

Scholars have raised doubts about the benefits of the ICoCA's complaint procedure, as victims already have the option to file complaints with the PSCs' grievance mechanism.²³³ However, the company grievance mechanisms of ICoCA member PSCs are subject to monitoring and oversight. In June 2018, the ICoCA launched *Guidance on Company Grievance Mechanisms*²³⁴ for Member PSCs to ensure that they are accessible, independent, and provide effective redress for victims of human rights abuses.²³⁵ In line with the UNGPs, the guidance provides additional tools for PSCs to put in place an effective grievance mechanism to address the substance of a complaint and grant appropriate relief.²³⁶ Therefore, the ICoCA's complaint procedure could represent a standardized mechanism for an effective reporting, sanctioning and remedy system to hold accountable PSCs for human rights violations.²³⁷ This could complement the UNGPs' mandate for businesses to provide remedy and implement 'means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available'.²³⁸

As the Association remains a relatively new initiative, its complaints procedure remains largely untested.²³⁹ However, considering the above information, it appears that the ICoCA provides a viable mechanism for PSCs in Latin America to adjust their business activities to international human rights standards.

²²⁹ Global Witness, 'At What Cost? Irresponsible Business and the Murder of Land and Environmental Defenders in 2017' (July 2018).

²³⁰ American Bar Association et al, 'Tilted Scales: Social Conflict and Criminal Justice in Guatemala' (2012); IACHR Extractives Report, paras 297–301, note 23.

²³¹ UNGPs, note 98, 28–29.

²³² Procedures Article 13: Receiving and Processing Complaints, note 121.

²³³ Natasha Arnpriester, 'Combating Impunity: the Private Military Industry, Human Rights, and the "Legal Gap"' (2017) 28 *University of Pennsylvania Journal of International Law* 1189, 1226–28.

²³⁴ ICoCA, 'Guidance on Company Grievance Mechanisms – Code paragraphs 66 to 68', <https://icoca.ch/en/guidance> (accessed 16 September 2018)

²³⁵ Gray, note 175.

²³⁶ Wallace, note 112, 77.

²³⁷ A/HRC/36/47, note 7, para 46.

²³⁸ A/HRC/WG.10/3/2, note 114, para 82.

²³⁹ Gray, note 175.

IV. MANDATORY ICoCA MEMBERSHIP: MAKING SOFT LAW COMPLIANCE A REQUIREMENT

Latin American states can play a key role in incentivizing PSCs that operate in their territory to join the ICoCA. Because it is a voluntary association, the ICoCA relies heavily on PSCs' reputational concerns and market pressure for enforcement of the Code, calling for PSCs' clients to give value or preference to those companies that have committed to operating in accordance with higher due diligence standards and with respect for human rights as outlined in the Code.²⁴⁰ The role of governments in procuring private security services becomes key here. To show a commitment to improving the private security environment in their countries, Latin American governments should consider requiring or incentivizing ICoCA membership for PSCs and their subcontractors²⁴¹ in public procurement policies, contracts, operation licenses and permits.²⁴² In fact, the ICoC has already become a point of reference for regulatory initiatives in several countries.²⁴³

For instance, the UK has adopted an industry-led rather than a statutory form of regulation for PSCs.²⁴⁴ The Security in Complex Environments Group (SCEG) is a British public–private partnership that requires its members to become ICoCA members and abide by the UNGPs.²⁴⁵ The SCEG provides support to the UK Government in the regulation of PSCs and has become an authoritative source on private security policy and regulation to implement transparent and robust standards for UK PSCs.²⁴⁶ For their part, Switzerland and the USA have enacted laws that require membership in the ICoCA of PSCs for certain types of public procurement. Under the Swiss Federal Act on Private Security Services Provided Abroad, PSCs domiciled in or operating from Swiss territory and providing security services abroad must be ICoCA members, along with PSCs that provide services to the Swiss government.²⁴⁷ The United States Department of State's Bureau of Diplomatic Security also requires that PSCs be ICoCA members to qualify for contracts under the Worldwide Protective Services II Program.²⁴⁸

²⁴⁰ Ibid.

²⁴¹ ICoC, note 133, see E.18.

²⁴² ICoCA, 'Promoting Responsible Private Security' (February 2017), <https://www.icoca.ch/sites/default/files/resources/ICoCA-Overview.pdf> (accessed 30 April 2018).

²⁴³ Procurement regulations of the Australian Department of Foreign Affairs and Trade require that PSCs must be ICoCA members or be willing to become as a condition to tender, in addition to demonstrating compliance with requirements on vetting and training of personnel, operating procedures, and redress and accountability mechanisms consistent with the ICoC. Buzatu, note 16.

²⁴⁴ White, note 156, 586.

²⁴⁵ Buzatu, note 16.

²⁴⁶ SCEG, 'Joining the SCEG', <https://www.sceguk.org.uk/joining-the-sceg> (accessed 19 September 2018).

²⁴⁷ FDFA, 'Federal Act on Private Security Services Provided Abroad' (11 April 2018), <https://www.eda.admin.ch/eda/en/home/foreign-policy/security-policy/bundesgesetz-ueber-die-im-ausland-erbrachten-privaten-sicherheit.html> (accessed 19 September 2018). FDFA, '2017 Annual Report on the Implementation of the Federal Act on Private Security Services Provided Abroad' (11 April 2018), https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/taetigkeitsbericht-2017_EN.pdf (accessed 19 September 2018).

²⁴⁸ 2016–2017 Annual Report, note 165. DCAF Mapping Study, note 3. US Department of State, 'The Worldwide Protective Services (WPS) 2 Program Provides Comprehensive Protective Security Services to Support U.S. Department of State Operations Around the World' (8 July 2015), <https://www.govcb.com/government-bids/The-Worldwide-Protective-Services-ADP14363630860000927.htm> (accessed 19 September 2018). However, the Department of Defense (DoD) will not require membership, certification and oversight by the ICoCA as a condition

Drawing upon the regulatory examples from Switzerland and the USA and adapting them to the national context, Latin American states could transform the ICoC into a legally binding instrument.²⁴⁹ Although industry-led regulation systems, like the one observed in the UK, could be the least burdensome approach for governments,²⁵⁰ client-based market pressure alone may not be enough to successfully implement the ICoC in Latin America, where many extractive companies that hire PSCs are also involved in human rights abuses.²⁵¹ Using the ‘market to regulate depends on clients actually valuing human rights and having sufficient market power to make compliance with the ICoC a factor that [businesses] compete on’.²⁵² This may not be the case of Latin America where, as illustrated above, unstable social and political environments coupled with the high demand for private security personnel have enabled PSCs to circumvent government controls.²⁵³

Taking the above into consideration, Latin American governments could implement regulations to the effect that the violation of ICoC would entail not only suspension or expulsion from the ICoCA,²⁵⁴ but also termination of government contracts and administrative fines, among other redress mechanisms available in domestic laws. This would be useful when government agencies directly procure private security services – for example, to guard a state-owned mine or other extractive projects. Moreover, Latin American governments could tie ICoC compliance across the private security and the extractive industries. For example, governments could require extractive companies to hire ICoCA-member PSCs as a condition to granting a mine concession. Violation by the extractive companies could result in suspension or termination of the permit, claims for breach of contract, termination of contracts, being dropped from preferred supplier lists, or being banned from participating in public bids.²⁵⁵ In this sense, contracting an ICoCA member PSC would be equated with higher quality services and lower risks for the client.²⁵⁶

By enacting statutory regulations implementing the ICoCA, Latin American governments would be able to argue that they have taken necessary steps to fulfil their obligations to protect human rights under the UNGPs, which are based on the binding obligations of states to prevent and punish human rights abuses by private actors such as businesses, and to provide access to justice for victims.²⁵⁷

(Footnote continued)

of any DoD contracts. Neither can DoD show the ICoCA any preferential treatment. ‘Private Security Companies-International Efforts’, https://www.acq.osd.mil/log/ps/psc_International_Efforts.html (accessed 19 September 2018). US Department of State, ‘2016 Annual Report of the Government of the United States of America for the Voluntary Principles on Security and Human Rights Initiative’ (31 May 2017), <https://www.state.gov/j/drl/rls/vprpt/2016/278232.htm> (accessed 19 September 2018).

²⁴⁹ Moyakine, note 147, 220. DeWinter-Schmitt, note 15.

²⁵⁰ White, note 156, 589.

²⁵¹ Wallace, note 112, 97.

²⁵² *Ibid.*, 97.

²⁵³ José L. Gómez, ‘The Role of Private Military and Security Companies in Modern Warfare – Impacts on Human Rights’, *Global Policy Forum* (11 August 2012), <https://www.globalpolicy.org/pmscs/51834-the-role-of-private-military-and-security-companies-in-modern-warfare-impacts-on-human-rights.html> (accessed 30 April 2018).

²⁵⁴ ICoC, note 133.

²⁵⁵ Blecher, note 159, 439.

²⁵⁶ Gray, note 175.

²⁵⁷ White, note 156, 596-96.

While requiring ICoCA membership for procurement in Latin America might be an aspirational goal given that governments in the region have long failed to perform independent and effective control over PSCs, ICoCA certification, monitoring and complaints procedures offer useful tools for supporting enforcement of the ICoC at a domestic level. Montreux Document membership by Latin American states should be encouraged concomitant to ICoCA membership, given the complementary nature of the two MSIs. This could be further advanced by participation in the VPs given the relationship between PSCs and the extractive industry in the region.

Furthermore, increased membership by Latin American CSOs in the ICoCA could help address challenges in the implementation and enforcement of the ICoC. CSOs could use their governments' membership in the ICoCA as leverage in advocacy efforts, e.g., to encourage or pressure the state to live up to its human rights commitments by effectively regulating PSCs and holding them accountable for abuses.²⁵⁸ If the government does not take effective measures to implement the ICoC, member CSOs can also urge the ICoCA to take appropriate action by sharing information about abuses or problematic patterns by member PSCs. Even in instances when local PSCs are not ICoCA members, affected communities and concerned CSOs might consider advocating before the local and national governments to push for regulation of the private security industry in line with the ICoC.

The ICoCA's relevance in the region depends on the active involvement of each of the three pillars: PSCs, governments and CSOs. This is vital not only for an effective enforcement of the ICoC, but also to maintain the independence of ICoCA. Taking into consideration that the ICoCA obtains its funding from dues and fees paid mainly by PSCs and states, active involvement of CSOs is key to help oversee resource management and funds allocation to prevent the ICoCA from being captured by private and government interests contrary to human rights standards.

In light of the above, the ICoCA should engage in active recruitment of Latin American members from the three pillars,²⁵⁹ with special attention paid to potential state members given their power to have a multiplier effect by incentivizing or requiring PSCs to comply with the Code.

V. CONCLUSION

The ICoC offers a comprehensive framework for governance and oversight of PSCs, which is rooted in human rights principles. Given the particular regional context of extensive extractive operations and the growing private security industry in Latin America, the ICoCA would complement local legal systems to advance human rights and provide redress for PSC abuses. This is crucial in countries with weakened institutions and unstable political environments, where corruption and lack of respect for the rule of law provide an enabling environment for human rights abuses. Because most

²⁵⁸ 'Why Join the Association', note 158.

²⁵⁹ Given that ICoCA's work has focused in Africa and the Middle East, ICoCA could organize or sponsor a regional meeting for Latin America PSCs, CSOs and states to become familiar with its mission. Compare with Montreux Document Forum, '31 States were Represented at the Regional Meeting of the Montreux Document Forum (MDF) in San José, Costa Rica', <http://www.mdforum.ch/en/first-regional-meeting-lac> (6 April 2018).

PSC members of the ICoCA are from Europe or the USA, the ICoCA's success will depend on its ability to expand its membership to other regions in need of a comprehensive accountability and remedy mechanism for human rights violations perpetrated by PSCs.²⁶⁰ Currently, there are no Latin American government members, and few CSOs and PSC members from the region. Greater engagement by these stakeholders with the ICoCA has the potential to strengthen the respect and protection of human rights in Latin America and even, in the long term, serve as a model for other areas of the world facing similar problems.

²⁶⁰ Human Rights Council, 'Summary of the fifth session of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies', A/HRC/WG.10/5/2 (20 February 2017).